IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE, HOHOE, HELD ON FRIDAY THE 30TH DAY OF JULY 2023 BEFORE HIS LORDSHIP AYITEY ARMAH-TETTEH J.

SUIT NO: E1/18/2020

MARTIN YAW KUMAH BREMPONG --- PLAINTIFF

VRS

1. MICHAEL TEPRETU
2. CEPHAS TEPRETU

--- DEFENDANTS

PARTIES: - PLAINTIFF PRESENT

DEFENDANTS PRESENT

COUNSEL: MR. EMMANUEL AWIAGAH FOR PLAINTIFF
MR. ERNEST DELA AKATEY FOR DANIEL AKUSTA FOR DEFENDANTS

J U D G M E N T

On 8 June 2020, Plaintiff issued out a writ of summons claiming the following reliefs against the Defendants:

a. *Declaration of title to all that piece or parcel of and situated(sic) or lying at Santrokofi-Benua which is bounded as follows: on the South side with a path which belongs to the community: on the North side with the properties of HAKER BREMPONG: On the East side with the properties of VICTOR TEPRETU and on the West side with the properties of FOSTER SENYO BREMPONG*
b. *Recovery of possession of the said land.*
c. *Damages for trespass.*

d. *Perpetual injunction restraining the defendants their assigns, servants, workmen, relatives and agents from entering or remaining upon or dealing or interfering with the land in dispute.*
e. *Costs inclusive of legal fees*

The defendants entered appearance and filed a defence denying the claim of Plaintiff.

THE CASE FOR THE PLAINTIFF

The case of the Plaintiff is that his late father called Ben Kwame Brempong during his lifetime gave him the disputed property in 1987 for residential purposes. According to Plaintiff part of the land was used as refuse dump and he planted cocoyam on it in 1987. It is the case of the Plaintiff that in the early part of the year 2020 one Edward Tepretu summoned Plaintiff's brother Harker Brempong before Nana Letsabii II for farming on the land. It is the further case of the Plaintiff that he was called as a witness at the arbitration but at the end an award was made that gave his land to the Defendant even though upon his inquiries at the arbitration, he was told the subject matter was not part of the subject matter of the dispute that went before the customary arbitration.

THE CASE FOR THE DEFENDANTS

The case of the defendants is that they own Santrokofi Benua town lands including Mankole Osi land, Obesta land, Afeko Katu land and Kamena Kato land part of which is the subject matter of this suit. It is the case of the Defendants that their father Agbeli Tepretu who was the then head of Family of the Tepretu family made a gift to members of the clan; Kadiadze, Klokoto and Brempong. According to defendants, Ben Brempong who Plaintiff claims is his father was given barely half of an acre because of his disability. It is the case of the defendants that the subject matter does from part of the land given to Ben Brempong. According to Defendants, Plaintiff and his brother shared their father Ben

Brempong's land and in doing so crossed over and lay claim to defendant's family land. Defendants contend that the Plaintiff's Brempong family were adjudged by the arbitration to have won part because members of the Tepretu family acquiesced by sitting on their rights for over 16 years and were caught by limitation while the Plaintiffs cultivated their land planting cocoa and cutting timber on it. Defendants further contend that Plaintiff nor his family own any part of Defendants' town lands.

The Defendants then counter claim as follows:

A. A declaration of title to the subject land bounded all over by Tepretu family land.
B. Perpetual injunction restraining the Plaintiff from ever interfering in the Defendant enjoyment of their and.
C. Cost(s) including legal fees.

At the close of pleadings, the following issues raised in the application for directions were set down for the determination of the suit:

1. *Whether or not the disputed land belongs to Ben Kwame Brempong.*
2. *Whether or not the disputed land was a gift to the Plaintiff since 1987.*
3. *Whether or not the Plaintiff has been in possession and control of the disputed land since 1987.*
4. *Whether or not the disputed land belongs to Agbeli Tepretu.*

The Plaintiff testified and called three witnesses. The 2nd defendant testified and called one witness.

Before I proceed with the issues in this matter I would want to deal with a preliminary issue. Counsel for the plaintiff in his written address submitted that defendants' action against him is statute barred. He contended that the Plaintiff has been in exclusive possession of the disputed land from 1987 till date. He further submitted that the general

rule is that a trespasser who takes possession of land owned by another person and remains in possession for an uninterrupted period of twelve years to the exclusion of the owner have adverse possession and the title of the owner will be extinguished.

At the stage the Plaintiff is raising a defence of limitation. I do not think he can do so.

Section 10 of the Limitation Act 1972 (NRCD 54) provides as follows:

> *10. Recovery of land*
>
> *(1) A person shall not bring an action to recover a land after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to a person through whom the first mentioned claims to that person*

Order 11 rule 8(1) of the High Court (Civil Procedure) Rule, 2004 (C.I. 47) provides as follows:

> *8.(1) A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release , any limitation provision, fraud or any fact showing illegality*
>
> > *(a) Which the party alleges makes any claim or defence of the opposite party not maintainable; or*
> >
> > *(b) which, if not specifically pleaded , might take the opposite party by surprise.*

In **Dolphyne v. Speed Line Stevedoring Co. Ltd & Anor** [1997-98] I GLR 795 the court in holding 3 of the headnotes held as that:

> *(3)The Limitation Decree, 1972 (NRCD 54) was essentially a special plea which as provided by Order 19, r 15 of the High Court (Civil Procedure) Rules, 1954 (LN 140A) had to be pleaded. Thus, if it was not pleaded, it would not be adverted to in submissions*

to the court. Furthermore, the court could not on its own motion take notice that the action was out of time. Consequently, in the instant case, since the defendant-respondent had not pleaded at the circuit court that the action was statute-barred there was no real defence to the plaintiff-appellants claim for damages for fraud.

Gbadegbe JSC explained Order 11 Rule 8(1) of C.I. 47 in **Adom v. Marfor** [2012]38 M.L.R.G. 58 as follows:

> *'It is a plea which except it is raised on the pleadings or arises from the effect of the pleadings one that ought not to be raised by a court on its own motion. In its essence, it is a plea mixed questions fact and law and to be good must be raised in compliance with the rules of court. I refer particularly to order 11 rule 8 (1) and 11(1) of the High Court, (Civil Procedure Rules) 2004, CI 47 in the words:*

In **Armah v. Hydrofoam Estates** [2013-2014]2 SCGLR 1551 at 1586 to 1569 Benin JSC held as follows:

> *"A party who seeks to rely on laches, acquiescence or limitation has a duty or obligation to plead them or to plead such facts as evince an intention to rely on same… These matters like laches, acquiescence and limitation are to be pleaded since the party who is entitled to rely on them may decide not to do so; the other party should not be taken by surprise and is therefore entitled to notice in the pleadings in order to raise any answer he may have to these claims…. Thus, they cannot be raised for the first time on appeal, unless the pleadings disclose the factual basis and evidence on it was lead at the trial. That is not the position in this case, as there was no such plea, and no evidence was forthcoming on the record."*

In the recent case of **Sarpor v Boosomprah** (J4 55 of 2020)) [2020] GHASC 66 (02 December 2020) the Supreme Court per Gbadegbe JSC in citing **Armah v. Hydrofoam Estates** with approval held as follows:

> *"A plea of mitigation cannot unlike other legal grounds be raised for the first time on appeal. It must have been pleaded in the pleadings of the party at the trial. This is because, the law frowns upon ambushing a party with such cardinal point of law that seeks to bar a person from seeking reliefs in court."*

From the decisional authorities, a party who intends to rely on the defence of limitation must specifically plead same or evince an intention to rely on it for the other party to have the opportunity to respond to it. Limitation is a right for a party to exercise as a defence in an action against him and he must indicate that he intends to rely on it in his pleadings. In the instant case the Plaintiff filed a reply which is a subsequent pleading to statement of claim but did not plead any limitation provision nor showed any intention that he will rely of limitation in his pleading. It was raised for the first time in the written address of the lawyer for Plaintiff. Having failed to specifically plead limitation in his pleadings he is deemed to have decided not to rely on it in this trial as was said by Benin JSC in **Armah v. Hydrofoam Estates** supra and Plaintiff cannot raise it in the written address and rely on it.

Even though the parties did not raise the validity or otherwise of the arbitration award as one of the issues to be discussed, this court cannot gloss over it because it arose out of the pleadings and the evidence led at the trial. I am therefore obliged to discuss it.

The parties filed their written addresses. Counsel for the Defendants in his written address filed on 27 July 2023 submitted that, the Plaintiff came to the court on the heels of an arbitration award of the Paramount Chief of Santrokofi Traditional Area and contend that this case must proceed in the limited context of customary arbitration and nothing more. What are the facts or evidence on customary arbitration in the instant case?

The Plaintiff in his statement of Claim pleaded at paragraphs 6,7,8,9 and 10 as follows:

1. The Plaintiff avers that early this year 2020 Edward Tepretu summoned Harker Brempong before Nana Letsabii II for a customary arbitration for farming on his land.
2. The Plaintiff avers that he Martin Yaw Kuma Brempong was one of the principal witnesses for Harker Brempong at the customary arbitration before Nana Letsabi II.
3. The plaintiff avers that he asked the panelists whether his land was also among the disputed land in which they declined.
4. The plaintiff avers that after the Locus visit organized by the members of the panelist (sic) of the customary arbitration, judgment went in favour of Harker Brempong.
5. The Plaintiff avers that the orders of the customary arbitration were that the land of Plaintiff which was not part of the disputed land was given to Edward Tepretu.

In response to these averments the Defendants pleaded in their statement of defence as follows:

14. Indeed, the arbitrators as usual requested all parties to mark their boundaries and so being petitioners, the defendants' representatives marked their boundary accordingly which boundary clearly puts that subject land in defendant land.
17. The arbitration did effectively stop members of the Plaintiff family from crossing over a gutter which separated their land into an adjoining land same not having ever been given his father.
18. Defendants contend that the Plaintiff's Brempong's were adjudged by the arbitration to have won in part because members of the Tepretu family acquiesced by sitting on their rights for over 16 years and were caught by limitation while the Plaintiffs cultivated their land planting cocoa and cutting timber on it.

20. In further denial, defendant say that the removal of the fence was Defendants family's response to Plaintiff's rejection of the award of the arbitration.

From the pleadings and written address of the Defendants, Defendants seem to rely on the award of the customary arbitration. Even though Plaintiff admits there was a customary arbitration, his contention is that he was not a party to the arbitration that even though his land was not the subject matter of dispute before the arbitration, his land was adjudged by the arbitration as belonging to Edward Brempong.

In effect what the Plaintiff is saying is that the customary arbitration went beyond its jurisdiction and decided on a subject matter that was not the subject matter of the dispute brought before them. In these circumstances it is my view it the defendants who are relying on the arbitration are the ones who have the burden of proof that there is a valid arbitration and that the plaintiff was a party to the arbitration is bound by the award and cannot resile from it.

In a customary arbitration if the arbitrators exceed their jurisdiction the arbitration will be declared in valid. See the case of **Republic v Adrei; Ex Parte Kpordoave III** [1987-88] I GLR where the court held as follows:

> "It was plain from both the record of the arbitration and the affidavits filed by the parties that the arbitrators exceeded their jurisdiction when they sought to demarcate and fix new boundaries between the L and K family lands as their arbitration award, when the dispute brought before them to adjudicate upon was a land matter between M and A The panel also breached the rules of natural justice in proceeding to carry out the demarcation of the land of the two families without having heard the applicant. And also in allowing members of both families to sit on the arbitration involving their own family lands."

So, in the instant case, the defendants who are relying on the arbitration have to prove that the arbitrators did not exceed their jurisdiction by deciding on Plaintiff land which according to Plaintiff was not the subject before them. They eventually have to prove that there was valid customary arbitration, and the Plaintiff is bound by it.

A valid customary arbitration is binding on the parties and their privies, and they cannot relitigate it on the same subject matter on the same issue. In **Kwaw v Awortwi**, [1989-90] 1 GLR the Court held as follows:

> 'On the evidence, there had been a valid customary arbitration into the dispute. The parties had accepted the decision and the plaintiff had paid the expenses of the defendant. Both of them were bound by the award and it was therefore not open to the plaintiff to go to the court to relitigate, the same issue. It was equally not open to the trial court to ignore the arbitration award which had been pleaded and established by evidence before the court without any legal justification.'

The binding nature of a valid customary arbitration has been codified in Section 109 of the Alternative Dispute Resolution Act, 2010 (Act 798) which provides as follows:

> *"An award in a customary arbitration*
>
> *(a) Is binding between the parties and a person claiming through and under them."*

It is trite that for a customary arbitration award to operate as estoppel against a party, that party should be a party or a privy to the dispute that went before the arbitration.

There is no doubt that there was an arbitration, and an award was made. The controversy is that plaintiff says he was not a party to the arbitration and his land was not the subject matter of the dispute that went before the arbitration. The defendants who are relying on

the award are saying that the Plaintiff herein and defendants were parties before to the arbitration and the Plaintiff is bound by the award as a party or a privy. In this regard Counsel for the Defendants in his written address is urging the court not to look at the Plaintiff as having any separate personal land which was outside the reach of the scope of the panel of arbitrators.

From the evidence record does the Plaintiff has a separate land from his other siblings who are the children of Ben Brempong and who were gifted their various separate lands by Ben Brempong before his death?

There is no doubt from the evidence on record that Ben Brempong had a parcel of land during his life time and same was shared between his three children. It is the case of the Plaintiff that land was inherited from Ben Brempong's father Nana Sarku whiles Defendants claim it was their father Agbeli Tepretu who gifted the said land to Ben Brempong.

It is pleaded at paragraph 4 of the statement of claim as follows:

> The Plaintiff states that his late father in [the] person of Ben Kwame Brempong during his life time gave him the disputed land in 1987 to develop for residential purposes.

On this the plaintiff testified as follows:

> "My late father Ben Kwame Brempong customarily inherited the undisputed (sic) land from his late father Nana Sarku Brempong 1, the Chief of Santrokofi- Benua who passed on in 1921. When my late father Ben Kwame Brempong became old and weak and can no longer farm, he shared the disputed land among his three children namely Harker Brempong, the late Victor Brempong and Martin Yaw Kumah Brempong, the Plaintiff in 1987 for residential purposes."

The defendant also pleaded at paragraphs 9 , 10, 11 and 16 as follows:

9. Accordingly, my father the then head of Tepretu family, Agbeli Tepretu made a gift to members of the clan; Kadiadze, Klokoto and Brempong.
10. Members of the Brempong family who [were], Agbeli Tepretu gave land directly were Agobotor, Kosi Brempong, Charles Brempong (alias Bobor Kosi), Gershon Brempong and Ben Brempong.
11. Ben Brempong who Plaintiff mentions as his father was given barely half of an acre because of his disability.
16. Paragraphs 6,7,8,9, 10 and 11 of the statement of claim is denied. Plaintiff and his brother shared their land being Ben Brempong's estate except that Plaintiff crossed over and purport to lay claim to defendants' family land which defendants vehemently resisted.

And 2nd Defendant testified as follows:

> 'Plaintiff's father Ben Brempong was given same measure of land by Defendants' family. That upon the death of Ben Brempong, his sons Harker, Martin, Theophilus, inherited their father's land. That the Plaintiff being son of Ben Brempong went outside their land purporting to fence around the subject land t prevent people from crossing over to dump refuse and defecating in their adjoining land.'

From the pleadings and evidence of the parties I am satisfied that Ben Brempong had a piece of land during his life and this was shared between his three children and each child had their separate land.

It is the case of the Plaintiff dispute before the arbitration was upon a complaint made by Edward Tepretu against Harker Trepretu and the subject matter of the dispute before the arbitration was not his portion of land but that of Harker Brempong.

PW3 Harker Brempong testified as follows:

> "I was summoned for customary arbitration before the Paramount chief of Santrokofi, Nana Latsabi II by the Defendants and Edward Tepretu for trespassing and felling a tree on their land. At the customary arbitration before Nana Letsabi II Judgment went in my favour on the 15th day of February 2020. At the customary arbitration before Nana Letsabi II, I took the Plaintiff as my witness because I share the North side boundary with the Plaintiff……. On the judgment day my land was given back to me, and the plaintiff's land instead given to the Defendants. On that judgment day I appealed to the panelist that the Plaintiff's land was not part of the customary arbitration."

And under cross examination of PW3 the following ensued:

> Q. Your case is that Plaintiff who is your brother was not a party to the arbitration before the Paramount chief.
>
> A. Yes
>
> Q. So the arbitration dealt with you as an individual?
>
> A. Yes
>
> Q. The arbitration said you and your siblings inherited your father's estate.
>
> A. No, I was summoned as an individual and the arbitration was all about me.

From the evidence of the Plaintiff's third witness both in his evidence in chief and under cross examination he maintained that he was sent before the customary arbitration as an individual and Plaintiff's was not a party and that plaintiff's land was not the subject of dispute before the customary arbitration. In the cross examination of PW3, lawyer for defendants did not challenge his testimony that he was sent before the customary arbitration as an individual and Plaintiff was not a party and that plaintiff's land was not the subject of dispute before the customary arbitration. These pieces of evidence are deemed admitted by defendant.

The law is that when a party had given evidence of a material fact and was not cross-examined upon, he need not call further evidence of that fact and the material facts will be deemed to have been admitted. See **Danielli Construction Ltd v. Mabey & Johnson Ltd** [2007-2008] 1 SCGLR where it was held as follows:

> "The Plaintiff company did not cross-examine the witness of the defendant company in the witness box when he gave that evidence; the plaintiff company did not also tender any evidence to challenge he veracity of the evidence in exhibit 2 and the inference was that it admitted the import of the evidence."

The law is that it is the party who stands to lose on an issue if no evidence is led on it that bears the burden of proof as far as that issue is concerned.

This is provided for in Sections 14 and 17 of The Evidence ACT 1975 NRCD 323;

> "14. Allocation of burden of persuasion
>
> > *Except as otherwise provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence that party is asserting.*

17. The burden of producing evidence

(a) *Except as otherwise provided by law, the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof.*

(b) *The burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to that fact.*

In the instant case it is the defendants who claim that the Plaintiff is bound by the arbitration who has the burden of proof of that claim. If no evidence is led that the Plaintiff was a party to the arbitration and that the subject matter of the dispute before the arbitration was for Plaintiff, it is the defendants who will lose. The defendants who are using the customary arbitration award as a shield have the burden to proof to show that there was a valid arbitration and Plaintiff is bound by it.

From the evidence the defendants who were relying on the arbitration were not able to discharge the evidential burden legally placed on them and they were unable to proof that the plaintiff was a party to the arbitration and his land was part of the subject matter of the dispute that went before the customary arbitration.

The defendant never called any of the arbitrators to testify for them. The law is that if a party has to establish his case and therefore assumes the onus of proof, he must call witnesses material to establish that case.

Section 11(1) of the Evidence Act, NRCD 323 provides:

6. Burden of producing evidence defined:

> For the purpose of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party.

In **Owusu v Tabiri** [1987-88] 1 GR 287 it was held as follows:

> 'It was a trite principle of law that he who asserted must prove and must win his case on the strength of his own case and not on the weakness of the defence. Since the original complaint was made by the plaintiff to the chief and at the time of making the complaint the defendants and their witnesses were not present as the evidence disclosed, the only person who could have assisted the trial court to resolve the issue as to whether what happened before the chief was an arbitration, as alleged by the defendants, or a negotiated settlement or an attempt to demarcate the boundary between the plaintiff and the defendants as claimed by the plaintiff, was the chief. Therefore the non-calling of the said chief as a witness was fatal to the case of the defendants because the onus was upon them to prove on the preponderance of probabilities that a valid arbitration was held.'

The Plaintiff also failed to tender in evidence the arbitration award which they claim was in writing which could have positively proved their case. The law is that where a party makes an averment capable of proof in some positive way eg. By producing documents, description of things, reference to other facts, instances and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath or having it repeated on oath by his witnesses. He proves it by producing other evidence of facts and circumstances from which the court can satisfy itself that what he avers is true. See **Klah v. Phonix Insurance Co Ltd.**[2012]SCGLR 1139

In the instant case, the Plaintiff who said there was a valid arbitration and that the Plaintiff is estopped by that failed to call any of the arbitrators, they also failed produce the award which they claim was in writing that would have enabled them to enforce it against the plaintiff as required by section 110 Alternative Dispute Resolution Act, 2010, Act 798. of as required by. The effect is that the Defendants failed prove that there was a valid arbitration, and that plaintiff was a party, and that the subject matter of the dispute was plaintiff's portion of the land and as such he is bound by it.

I find and hold that the defendant who were relying on the arbitration and saying that the plaintiff was a privy to that arbitration has failed to prove same and I hold that the Plaintiff is not bound by the award.

I will now deal with the issues raised in the application for directions. I will discuss all the issues together as the discussion of one will dovetail into the others.

From the evidence before this court, there is no doubt that Ben Kwame Brempong the father of the Plaintiff during his life had a piece of land at Santrokofi Benua. What is in controversy is whether Ben Kwame Brempong inherited it from his father Nana Saku Brempong I as claimed by the Plaintiff or as claimed by defendants it was a gift, he received from Agbeli Tepretu the father of the defendants. The Plaintiff testified that his father Ben Kwame Brempong inherited the land from his father Nana Saku Brempong I the Chief of Santrokofi-Benua. While the Plaintiff also claim that it was the father of 2nd Defendant Agbeli Tepretu who as the head of the Tepretu Family at the time gifted the land to Ben Kwame Brempong. I do not think from the issues before me I have to worry my head over whether Ben Kwame Brempong inherited the land from his father Nana Saku Brempong I or it was a gift Ben Brempong received from Defendants' father Agbeli

Tepretu. What I have to determine is was Ben Kwame Brempong the owner of a land at a point in time in his life? And my answer is in the affirmative.

It is the case of the Plaintiff that his father made a gift of the land to his children when he was old and weak in 1987. Plaintiff testified as follows:

> 'When my late father Ben Kwame Brempong became old and weak he can (could) no longer farm, he shared the disputed land among his three children namely Harker Brempong, the late Victor Brempong and Martin Yaw Kumah Brempong, the Plaintiff in 1987 for residential purpose.'

This piece of evidence was corroborated by PW3 when he testified as follows:

> "That during the life time of Ben Kwame Brempong his late father divided his land into three parts. That his late father share (d) these lands among his three children namely Martin Yaw Kumah Brempong the plaintiff, Harker Brempong, myself and Victor Brempong the late."

Plaintiff's first witness Victor Tepretu who testified that the 1st defendant is his son and the 2nd defendant his cousin also corroborated the evidence of the Plaintiff. The 2nd Defendant in his evidence said upon the death of Ben Brempong's it was his children including the Plaintiff who inherited him. I am satisfied on the evidence that Ben Brempong shared the land to his children, and they had their separate and distinct lands. The question that needs to be answered is was the refuse dump part of the land of Ben Brempong which was gifted to the Plaintiff.

For emphasis and clarity I will reproduce the pleadings of the plaintiff. At paragraphs 4 and 5 of the statement of claim it was pleaded as follows:

3. The Plaintiff states that his late father in [the] person of Ben Kwame Brempong during his lifetime gave him the disputed land in 1987 to develop for residential purposes.

4. That the Plaintiff states that part of the disputed land ws used as refuse dumping ground and he, the Plaintiff planted cocoyam on the disputed land in 1987 as his cocoyam farm.

The Plaintiff testified as follows:

> "In 1987, I fenced round my plot with bamboo sticks for planting garden eggs, cocoyam and plantain and a portion for planting palm trees because I was not having money to put u a building…….. since 1987 I have been in occupation and possession of the disputed land and without any disturbance from any quarters including the Defendants."

PW1 corroborated the evidence of the Plaintiff when he testified as follows:

> "The Plaintiff's land was formerly the community refuse dumping ground which forms a portion of Ben Kwame Brempong's land….. I have been on my land for over 60 years and normally see the Plaintff on his land working and even fence round his land with bamboo sticks for over 30 years without any resistance or confrontation from any quarters including the Defendant."

Defendants' only witness Felix Krokoto in his evidence under cross examination admitted that part of the refuse dump belonged to Ben Brempong the father of the Plaintiff. This is the answer he gave under cross examination:

Q. Are you aware that Agbeli Tepretu and Kwame Brempong shared common boundaries at the Northern portion of the land?

A. Yes, they share boundary.

Q. I suggest to you that the refuse dump is on Ben Kwame Brempong's land.

A. The refuse dump is located on both lands where they share boundary.

Further

Q. I suggest to you that the refuse dump belongs to Ben Kwame Brempong.

A. The down part of the refuse dump belongs to Ben Kwame Brempong and the southern part belongs to Agbeli.

The Defendants' only witness admits that portion of the refuse dump belongs to Ben Kwame Brempong the father of the Plaintiff. And the law is that where the evidence of an opponent corroborates the evidence of the opposite party, and that opponent's remain uncorroborated on an issue, the court is bound to accept the corroborated evidence unless there are compelling reasons to the contrary. See **Chou Sen Lin v. Tonado Enterprise Ltd** [2007-2008] 1 SCGLR 135 at 140 per Brobbey JSC

" On the point that devastated the case of the defendants was the evidence given by their own witness, the second defendant witness. His testimony was clearly against them to the extent that he even described the acquisition of the third plot as an error. Rather, his testimony supported the case of the plaintiff. The law on the issue is settled and it is this: when the evidence of a party remains uncorroborated buy that of his opponent is corroborated even by the witness of

his opponent, the court ought not to accept the uncorroborated version in preference to the corroborated one. The only exception to this rule is where the court has or finds reason to reject the corroborated evidence."

In the instant case the Plaintiff's case that the refuse dump formed part of his father's land which was later given to him was corroborated by his own witnesses and the witness of his opponent, I have no reason to reject the claim of the plaintiff which has been corroborated. I am satisfied and accept the Plaintiff's version and find that the refuse dump was part of the land owned by Ben Kwame Brempong.

There is evidence on record that the Plaintiff has fenced the refuse dump the subject matter in dispute. The Plaintiff himself testified that he fenced the refuse dump in 1987 and he has been farming on it since 1987. The 2nd defendant in his testimony under cross examination admitted that the plaintiff has fenced the refuse dump.

This is what transpired under cross examination of Defendant.

Q. Can you tell the court when the refuse dump was fenced?

A. No I cannot tell.

Q. I suggest to you that it was in 1987.

A. No

Q. Who fenced the refuse dump?

A. Martin Yaw Kumah Brempong, the Plaintiff.

Q. when did you noticed that?

A. between 2004-2006 when I arrived from Tema.

Defendants admitted that the Plaintiff has fenced the refuse dump. At least the 2nd defendant testified that he got to know that the Plaintiff has fenced the refuse dump which is the subject matter of this suit between 2004-2006. There is no evidence that when the 2nd defendant noticed plaintiff fenced the refuse dump he took any action against Plaintiff. From the evidence I am satisfied that the Plaintiff has been in effective possession of the disputed property.

PW 1 testified that the Plaintiff has been in possession of the subject matter for over 30 years. This was his testimony on the issue:

> "I have been on my land for over 60 years and normally see the plaintiff on his land working and even fence round his land with bamboo sticks for over 30 years without any resistance or confrontation from any quarters including Defendants."

This material evidence was not denied by lawyer for defendant when he cross examined PWI. The defendants would be deemed to have admitted same. See **Danielli Construction Ltd v. Mabey & Johnson Ltd (supra).**

The law is that a person in possession of a thingy is presumed by the owner of that thing. Section 48 of the Evidence Act (supra) provides as follows:

(1) The things a person possesses are presumed to owned by that person.

(2) A person who exercises acts of ownership over property is presumed to be owner of it.

Section 48 is a rebuttal presumption, and the law is that the person against whom a rebuttable presumption is invoked who has the burden to rebut that presumption. From the evidence on record the Defendants have been unable to lead any credible evidence to rebut the presumption of ownership of the plaintiff to the land by his being in possession.

In **Osei (substituted by) Gilard V. Korang** [2013-2014] 1 SCGLR 221 at 214 Ansah JSC held as follows:

> 'Now in law, possession is ninth-tenths of the law and a plaintiff in possession has a good title against the whole world except one with better title. It is the law that possession is prima facie evidence of the right to ownership and it being good against the whole world except the true owner, he cannot be ousted from it.'

Both parties are claiming declaration of title and a party in an action for title to land the party is required to lead credible and admissible evidence to prove the root of tile, mode of acquisition and acts of ownership and possession.

The Plaintiff testified that the defendants destroyed his fence and uprooted some of his food crops. This was corroborated by PW3 when he testified that the defendants pulled down plaintiff's fence and destroyed plaintiff's food crops and belongings. These were not denied by lawyer for the Defendants when he cross examined plaintiff and PW3. Indeed, 2nd defendant in his testimony said the destroying of the fence was a reaction to Plaintiff's refusal to abide by the award of the arbitration. I am satisfied that the defendants trespassed onto Plaintiff's land and destroyed plaintiff's properties. Plaintiff is entitled to damages.

The Plaintiff has proven that his father made a gift of the land to him, and he has been possession of the disputed land and has shown acts of ownership. On all the evidence I find that the Plaintiff's claim is more probable than not as against the defendants. I therefore dismiss the defendants' counter-claim and enter judgment for the Plaintiff as follows:

a. *Declaration of title to all that piece or parcel of and situated(sic) or lying at Santrokofi-Benua which is bounded as follows: on the south side with a path which belongs to the community: on the north side with the properties of Harker Brempong: on the east side with the properties of victor Tepretu and on the east side with the properties of foster Senyo Brempong*
b. *Recovery of possession of the said land.*
c. *Ghs 5,000.00 Damages for trespass.*
d. *Perpetual injunction restraining the defendants their assigns, servants, workmen, relatives and agents from entering or remaining upon or dealing or interfering with the land in dispute.*
e. *Costs Ghs10,000.00 in favour of Plaintiff.*

(sgd)

AYITEY ARMAH-TETTEH J.

(JUSTICE THE OF HIGH COURT)